No. [redacted] 141

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

against

HONORABLE JOHN RELLSTAB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Respondents.

ACTION AT LAW.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

FREDERIC B. SCOTT,
Attorney for Petitioner.

[redacted] Printing and Publishing Office, Inc., 234 Fulton St., New York, N. Y.

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

AGAINST

Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
Respondents.

October Term, 1926.

Comes now The Delaware, Lackawanna and Western Railroad Company, by Frederic B. Scott, Esq., its Attorney, and moves this Honorable Court that it shall, by certiorari or other proper process, directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, to require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein Hon. John Rellstab, Judge of the United States District Court for the District of New Jersey, and the United States District Court for the District of New Jersey were respondents and your petitioner, The Delaware, Lackawanna and Western Railroad Company, petitioner, and to that end, it now tenders herewith its petition and brief with a certified copy of the entire record in said cause of said Circuit Court of Appeals.

FREDERIC B. SCOTT,
Attorney.

SUPREME COURT OF THE UNITED STATES

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,	October Term, 1926.
AGAINST	
Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Respondents.	PETITION.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, The Delaware, Lackawanna and Western Railroad Company, respectfully shows unto this Honorable Court:

I. That your petitioner is a corporation, organized and existing by virtue of the laws of the State of Pennsylvania, and is a citizen of that state.

II. That on the ninth day of December, 1920, David Ginsberg, individually and as next of friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey, in the Morris Circuit thereof, for personal injuries to the said David Ginsberg and Harry Ginsberg, and on account of the death of George Ginsberg, for the alleged negligent acts of the agents and servants of your petitioner, in running into and upon said named parties a locomotive operated by your petitioner.

III. Your petitioner further shows that on December 28th, 1920, said cause was removed to the United States District Court for the District of New Jersey, on account

of diversity of citizenship wherein issue in said cause was subsequently joined in said action and the case duly noticed for trial.

IV. Your petitioner further shows that on December 2nd, 1921, at the September, 1921, Term of the District Court, said cause was tried and resulted in a verdict for the plaintiffs in said action, which verdict was subsequently set aside by said Court and a new trial granted your petitioner.

V. Your petitioner further shows that thereafter at the January, 1923, Term of Court, said cause was again brought on for trial and on March 3rd, 1923, the jury in said cause rendered a verdict for the defendant and that after the denial by said Court of an application by the plaintiffs for a new trial, rule for judgment final for the defendant, with costs, was entered in the said District Court on June 21st, 1923.

VI. Your petitioner further shows that thereafter, on August 27th, 1923, the plaintiffs in said action filed their assignments of error and petition for a writ of error to the United States Circuit Court of Appeals for the Third Circuit, which writ of error was allowed and said cause removed to the said United States Circuit Court of Appeals for the Third Circuit for review, and that on March 21st, 1924, the mandate of said Court, affirming the judgment of the District Court in favor of your petitioner was filed with and in the said District Court.

VII. Your petitioner further shows that at no time during the term at which judgment final for your petitioner was rendered in the District Court did the District Court extend said term, nor did the attorneys for the respective parties to said action stipulate or file any stipulation in the District Court, extending the term in which said judgment final was rendered, and that the said April, 1923, Term of said District Court expired on the day previous to the opening of the September, 1923, Term of said Court, which according to the statute in such cases made and provided and the rules of

said District Court, commenced on the second Tuesday in September, 1923.

VIII. Your petitioner further shows that, even after the mandate of the United States Circuit Court of Appeals for the Third Circuit, affirming the judgment for your petitioner, in the above Court, came down and was filed in the District Court on March 21st, 1924, which was during the January, 1924, Term of said District Court, and which Term, according to the statute in such cases made and provided, and the rules promulgated by said District Court, expired on the day preceding the first Tuesday in April, 1924, said plaintiffs did not extend said January, 1924, Term of said District Court, either by stipulation with your petitioner or by any order of said Court, and that the said January, 1924, Term of said District Court expired without it in any way or manner being extended, all of which facts appear in the transcript of the record accompanying this petition.

IX. Your petitioner further shows that on the first trial of said cause in the District Court, the reason why said District Court set aside the verdict rendered in favor of the plaintiffs and against your petitioner, was for and on account of certain perjured testimony given on the trial of said cause on behalf of the plaintiffs in said cause by two witnesses, one Addie Ridner and the other William Ridner.

X. Your petitioner further shows that on the second trial of said cause, which resulted in a verdict for your petitioner, your petitioner produced the said Ridners as witnesses on its behalf and, although the said plaintiffs and their attorney were well aware of the fact that said Ridners had given testimony on the first trial of said cause when they appeared for the plaintiffs, which was contradictory to the testimony said witnesses gave on behalf of your petitioner on the second trial of said cause, neither said plaintiffs nor their attorney in any way or manner sought to impeach the veracity or credibility of said Ridners on the second trial of said cause.

XI. Your petitioner further shows that on March 30th, 1925, the plaintiffs in said action in the District Court filed two affidavits with the Clerk of said Court, of which true copies are set out in the accompanying transcript of the record, and that the William Ridner who made one of said affidavits is the William Ridner hereinafter referred to, and was a witness for the plaintiffs on the first trial of said cause, and a witness for your petitioner on the second trial of said cause.

XII. Your petitioner further shows that on the filing of said affidavits and a notice of application to your petitioner to be made to the Honorable John Rellstab, Judge of the District Court for the District of New Jersey, said Honorable John Rellstab did on April 28, 1925, allow said plaintiffs a rule to show cause why the judgment in favor of your petitioner which as heretofore set forth is shown to have been entered on June 21st, 1923, should not be set aside and a new trial granted, and that your petitioner at said time, to wit, on March 30th, 1925, filed answering affidavits, which also appear in said transcript.

XIII. Your petitioner further shows that, pursuant to said rule to show cause allowed said plaintiffs, notice of the taking of testimony thereunder was given your petitioner and that on May 5th, 1925, testimony was taken on said rule to show cause before the Honorable John Rellstab, and said rule to show cause was made absolute by the said Honorable John Rellstab, by his order of May 9, 1925, a copy of which appears in said transcript; although on the hearing of said testimony, the said Honorable Joseph Rellstab recognized that the said District Court may have lost jurisdiction over the verdict rendered in favor of your petitioner and the judgment final entered thereon on June 21, 1923.

XIV. Your petitioner further shows that, being advised that the said Honorable John Rellstab, Judge of the United States District Court for the District of New Jersey and said United States District Court for the District of New

Jersey had no right or authority to disturb or set aside the verdict and judgment entered thereon in favor of your petitioner on June 21, 1923, because the said District Court had lost jurisdiction of said cause, the Term of which District Court, in which said judgment final was rendered in favor of your petitioner, having long since expired and not having been extended either by stipulation between any of the parties thereto or any order of the Court in the premises, on the 13th day of July, 1925, it obtained from the United States Circuit Court of Appeals for the Third Circuit a Rule to Show Cause why a mandamus should not issue against the respondents herein for the purpose of directing and commanding them to reinstate the judgment entered in said District Court in favor of your petitioner, and that said Rule to Show Cause thereafter duly came on for argument, in the United States Circuit Court of Appeals for the Third Circuit on the 4th day of December, 1925, and, after due consideration thereof by said Court, said Court did, on the 25th day of September, 1926, in its opinion filed in said cause, as appears in the accompanying transcript record, dismiss your petitioner's Rule to Show Cause for reasons therein set forth, and thereupon entered its order in the premises declining to issue said mandamus, although your petitioner verily believes that the said United States Circuit Court of Appeals for the Third Circuit was in error and should be reversed, in that it appears that the original action commenced in the United States District Court for the District of New Jersey may have been taken on appeal to the United States Circuit Court of Appeals, in that the suit involved over Three Thousand Dollars ($3,000) in amount and was between citizens of different states; that said case was one within the appellate jurisdiction of the United States Circuit Court of Appeals, and that it should have directed the issuance of the Writ of Mandamus to the respondents.

XVI. Your petitioner believes that the aforesaid judgment of the United States Circuit Court of Appeals is erroneous and that this Honorable Court should require the said

case to be certified to it for a review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to prepare and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Third Circuit in the said case therein, entitled the Delaware, Lackawanna and Western Railroad Company, Petitioner, versus Honorable John Rellstab, Judge of the United States District Court for the District of New Jersey and the United States District Court for the District of New Jersey, Case No. 3379, to the end that the said case may be reviewed and determined by this Court, as provided in judicial Code Section 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act and that the said judgment of the said United States Circuit Court of Appeals for the Third Circuit in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
By FREDERIC B. SCOTT,
Its Attorney.

STATE OF NEW YORK, }
County of New York, } ss:

FREDERIC B. SCOTT, being duly sworn, says, that he is counsel for The Delaware, Lackawanna and Western Railroad Company, the petitioner named in the foregoing petition, and as such has had charge for it of the case in the petition mentioned in the District Court of the United States for the District of New Jersey, and in the United States Circuit Court of Appeals for the Third Circuit; that he has read said petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

FREDERIC B. SCOTT.

Subscribed and sworn to before me this First day of November, 1926

JOSEPH FIELL,
Notary Public New York County No. 49.
Commission expires March 30, 1927.

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IN THE

SUPREME COURT OF THE UNITED STATES

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,	October Term, 1926.
AGAINST	
Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Respondents.	Action at Law.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

Statement of Case.

On December 9th, 1920, David Ginsberg, individually, and as next friend of Harry Ginsberg, and as Administrator *ad Prosequendum* of the Estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey, for personal injuries and damages which the said David Ginsberg and Harry Ginsberg were alleged to have suffered and for the pecuniary loss suffered on account of the death of George Ginsberg for the alleged negligent acts of the agents and servants of the Railroad Company in running into and upon said parties a locomotive operated by the agent of the Railroad Company while said parties were endeavoring to pass over a railroad grade crossing in an automobile.

NOTE. Except where otherwise stated italics are ours.

On account of the diversity of citizenship of the parties, the case was removed from the State Court to the United States District Court for the District of New Jersey, where issue was subsequently joined and the case duly noticed for trial.

On December 2nd, 1921, at the September Term of the District Court, the trial of the cause was completed, resulting in a verdict for all the plaintiffs in said action, which verdict was subsequently set aside by the Trial Court and a new trial granted the Railroad Company, on account of the subornation of perjury by the plaintiff, David Ginsberg, of two of his witnesses on said trial by the names of Addie Ridner and William Ridner.

Subsequently said cause was again tried and on March 3rd, 1923, at the January Term of the District Court, the jury rendered a verdict for the defendant Railroad Company, a new trial in which matter was denied by the Trial Judge, who is one of the respondents in this proceeding, and a rule for final judgment with costs was entered in the District Court on June 21st, 1923, R. p. 31.

The plaintiff, David Ginsberg, subsequently took a writ of error to the Circuit Court of Appeals for the Third Circuit.

On March 21st, 1924, the mandate of that Court, affirming the judgment of the District Court in favor of the petitioner Railroad Company, was filed in the District Court, R. p. 31.

At no time during the Term at which the judgment final in favor of the petitioner Railroad Company was rendered in the District Court was there any order of the said District Court, extending said Term, nor did the respective parties to said action stipulate or file any stipulations in the District Court, extending the Term in which said judgment final was rendered; neither did the District Court, after the mandate of the Circuit Court of Appeals for the Third Circuit was filed, on March 21st, 1924, extend said Term; nor did the attorneys for the respective parties, by stipulation, extend the Term in which the mandate from the Circuit Court of

Appeals for the Third Circuit was filed with the District Court; and the said Term in which the mandate from the Circuit Court of Appeals for the Third Circuit came down and was entered in the District Court likewise expired without an extension of said Term, R. p. 13.

The reason why the District Court set aside the verdict on the first trial of the cause rendered in favor of the plaintiff, Ginsberg, and against the petitioner Railroad Company was on account of certain suborned and perjured testimony given on the trial of said cause on behalf of the plaintiffs by two of the plaintiffs' witnesses, namely: Addie Ridner and William Ridner.

On the second trial of said cause, which resulted in a verdict for the petitioner Railroad Company, the petitioner, instead of the Ginsbergs produced the witnesses Ridners and, although the plaintiffs and their attorneys were well aware of the fact that the said Ridners had given false testimony on the first trial of said cause, when they appeared for the plaintiffs, which was contradictory to the testimony said witnesses gave on behalf of the petitioner railroad company on the second trial of said cause, neither the plaintiffs, nor their attorneys in any way or manner sought to impeach the veracity or credibility of said witnesses on the second trial of said cause, although opportunity was accorded them.

On March 30th, 1925, the plaintiff Ginsberg sought to impeach the verdict in favor of the petitioner Railroad Company by filing with the Clerk of the District Court two affidavits, one by the witness, William Ridner, purporting to show on behalf of the witness, William Ridner that he testified on the second trial of said cause false for the petitioner Railroad Company and another affidavit by Ridner's son, Seth, in which he endeavored to show that the accident to the plaintiffs was caused in a manner as would place liability upon the Railroad Company.

After taking testimony in open Court before the respondent, the Honorable John Rellstab, the respondent, granted the Ginsbergs a new trial in said matter to the prejudice of the petitioner Railroad Company.

Exhibit "A" in the transcript of the record of the Circuit Court of Appeals for the Third Circuit, p. 8, accompanying this petition, is the docket entries of the District Court concerning the case involved and an examination of it shows that the Terms of said Court in which said cause was pending were never extended after final judgment was rendered on June 21st, 1923, nor during the Term in which the mandate of the Circuit Court of Appeals for the Third Circuit, affirming the judgment in favor of the petitioner Railroad Company was filed in the District Court, those facts being uncontradicted and undisputed.

On July 13th, 1925, the Circuit Court of Appeals for the Third Circuit allowed the petitioner a Rule to Show cause why a mandamus should not issue to the respondents, the Honorable John Rellstab, Judge of the United States District Court for the said District and said District Court directing the respondents to reinstate the judgment so set aside.

Argument was had on said Rule to Show Cause in the Circuit Court of Appeals for the Third Circuit on December 4th, 1925, and on September 25th, 1926, the Circuit Court of Appeals for the Third Circuit filed its opinion, R. 45, dismissing and discharging the petitioner Railroad Company's application for a mandamus on the ground that it had no power to issue said writ, although it was undisputed that at the time the District Court set aside said judgment, the respondent, the Honorable John Rellstab, assumed to act in the premises at a time after the expiration of the Term in which final judgment had been rendered, which Term had in no way or manner been extended, R. p. 47.

Statement of Question Involved.

The question involved in this application is whether the Circuit Court of Appeals for the Third Circuit had the authority to and should have issued a writ of mandamus directed to a District Court and one of its Judges, when said Judge had set aside a verdict in favor of the petitioner more

than four terms after said judgment was entered, there never having been any order made by the District Court or any of its Judges extending the Term in which said judgment was entered; neither were any stipulations entered into or filed by the respective parties to the litigation which terminated in a final judgment extending the Term in which the said judgment final was rendered.

Argument on Behalf of the Petitioner.

The Circuit Court of Appeals denied the petitioner Railroad Company's application for the mandamus because of its decision that it had no power to issue the writ, it saying:

> "When the judgment was set aside, nothing was pending in this Court or the District Court. The Term in which the Federal judgment had been entered in the District Court, as above stated, had long since expired without any extension of any kind. If we dismiss the order, the case may possibly reach this Court again, but if the judgment is reinstated, the judgment will remain final in that Court and will never come into this Court. The reinstatement of the judgment, therefore, can not be in aid of the jurisdiction of this Court. Accordingly, we have no power to issue the writ" R. p. 48.

From the reasoning of the Circuit Court of Appeals, it appears that that Court lost sight of the fact that the judgment which the lower Court disturbed was its own judgment, and not that primarily entered by the Court below, because the Circuit Court of Appeals, affirmed the judgment in favor of the petitioner, their decision thereon being reported in 296 Federal 439 and thereafter issued its mandate that said judgment be carried out, which mandate was filed in the District Court on March 21st, 1924, R. p. 11.

Southard, et al v. *Russell*, 16 Howard, 570, being authority for the contention that such was the status of judgment entered in the District Court, your Honorable Court speaking through Mr. Justice Nelson, saying:

> "The decree sought to be set aside by this bill of review in the Court below was entered in pursuance of

an appeal in the original suit. *It is, therefore, the decree of this Court, and not that primarily entered by the Court below, that is sought to be interfered with.*"

Any interference by the District Court with the judgment of the Circuit Court of Appeals, either by way of rule to show cause for the granting of a new trial, rehearing or review, was only permissible after the proper application had been made to and allowed by the Circuit Court of Appeals, for, as your Honorable Court has said, *In re Potts*, 166, U. S. 263, speaking through Mr. Justice Gray (pp. 265-266):

> "The general rules which govern cases of this kind are stated and the decisions by which those rules have been established are collected in the recent case of Sanford Fork and Tool Company, petitioner, 160 U. S., 247, in which this Court said:
>
> 'When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as well as the law of the case and must carry it into execution according to the mandate. That court can not vary it or examine it for any other proofs for execution or give any other or further relief or review it, even for apparent error in matter decided upon appeal or intermeddle with it, other than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues a decree of this Court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal, if involving a sufficient amount, or by a writ of mandamus to execute the mandate of this Court; but the Circuit Court may consider and decide any matters left open by the mandate of this Court and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this Court at the time of rendering this decree may be consulted to ascertain what was intended by its mandate, and, either upon an application for a writ of mandamus or upon a new appeal, it is for this Court to construe its own mandate and act accordingly.'"

"* * * When the merits of a case have been once decided by this Court upon appeal, the Circuit Court has no authority, without express leave of this Court, *to grant a new trial*, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." (*Cases cited.*)

"In this respect, a motion for a new tria' or petition for a rehearing stands upon the same ground as a bill of review." * * *" 267.

The District Court, or its Judges can not, to use the expression of your Honorable Court "intermeddle with it further than to settle so much as has been remanded."

In re Potts, 265, *supra.*

The Circuit Court of Appeals still retains its jurisdiction to see that its mandate is carried out as was done by the Circuit Court of Appeals for the Third Circuit itself in *Herold* v. *Kahn, et al.*, 163 Fed., 947-8, where it recognized the practice herein contended for, although not under circumstances similar to your Honorable Court's action in the case of *In re Potts, supra.*

The instant case was one within the appellate jurisdiction of the Circuit Court of Appeals for the Third Circuit to issue a writ of mandamus in aid of its appellate jurisdiction, which might otherwise have been defeated by the unauthorized action of the Court below, if we read correctly what your Honorable Court has said in *McClellan* v. *Carland*, 217 U. S., 268, where, speaking through Mr. Justice Day, it wat said:

"It is further objected that the Circuit Court of Appeals had no jurisdiction to issue the writ of mandamus as that writ can only be issued in aid of the appellate jurisdiction of the Circuit Court of Appeals, and it is contended, as that Court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed.

"Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States. This section we have already had occasion to quote, and when read in connection with Section